(2)

No. 97-754

Supreme Court, U.S.
F I L E D
DEC 3 1997
CLERK

In The
Supreme Court of the United States
October Term, 1997.

Robert Wagner and Margaret Wagner,
Petitioners,
v.
Patricia Devine, Kevin A. Jordain, Charles E. Moran, III, Arthur Therrien, John E. Whelihan, the City of Holyoke, Massachusetts, the International Brotherhood of Police Officers, and Local 388 of the International Brotherhood of Police Officers,
Respondents.

On Petition For Writ Of Certiorari To
The United States Court Of Appeals For
The First Circuit

Brief of Arthur Therrien, the International Brotherhood Of Police Officers, and Local 388 Of the International Brotherhood Of Police Officers In Opposition

---

Lawrence D. Humphrey
International Brotherhood of
Police Officers
159 Burgin Parkway
Quincy, MA 02169
(617) 376-0220

2088

Question Presented

1. Whether the Chief of Police who is a policymaker is entitled to First Amendment protection from constructive discharge by a minority of city council members and a private individual who petitioned the city council for redress of grievances because of the Chief's close association with the Mayor with whom the minority of city council members have political differences.

Table of Contents

Table of Authorities		ii
Decisions Below		2
Jurisdiction		2
Relevant Constitutional And Statutory Provisions		2
Statement Of The Case		3
Reasons For Denying The Writ		4
I.	THE FIRST CIRCUIT'S HOLDING THAT THE FIRST AMENDMENT DOES NOT PREVENT THE CONSTRUCTIVE DISCHARGE OF A POLICYMAKER BECAUSE OF HIS POLITICAL AFFILIATION DOES NOT WARRANT REVIEW	4
II.	REVIEW IS NOT WARRANTED BECAUSE NO CONFLICT EXISTS AMONG THE LOWER COURTS	9
Conclusion		12

Table of Authorities

Cases

Affrunti v. Zwirn, 892 F. Supp. 451 (E.D. N.Y. 1995), aff'd, 100 F.3d 943 (2d Cir. 1996)	7
Agosto-De-Feliciano v. Aponte-Roque, 889 F. 2d 1209 (1st Cir. 1989)	8,11
Baker v. Carr, 369 U.S. 186 (1962)	9
Branti v. Finkel, 445 U.S. 507 (1980)	5,6,7
Elrod v. Burns, 427 U.S. 347 (1976)	5,6,7,9
Gibson v. City of Alexandria, 885 F. Supp. 133 (E.D. Va. 1994)	10
Gonzalez v. Benavides, 712 F. 2d 142 (5th Cir. 1983), cert. denied, 475 U.S. 1140 (1986)	9
In re Woods, 143 U.S. 202 (1892)	5
Kaluczky v. City of White Plains, 57 F. 3d 202 (2d Cir. 1995)	7,11,12
Layne F. Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387 (1923)	10
Liebermann v. Reisman, 857 F. 2d 896 (2d Cir. 1988)	11

Miller v. Town of Hull, 878 F. 2d 523
(1st Cir.) cert. denied, 493 U.S. 976 (1989) 9

New York Times Co. v. Sullivan,
376 U.S. 254 (1964) 8

Peeper v. Callaway County Ambulance
District, 122 F. 3d 619 (8th Cir. 1997) 9

Rice v. Sioux City Cemetery,
349 U.S. 70 (1955) 10

Romero-Barcelo v. Hernandez-Agosto,
75 F. 3d 23 (1st Cir. 1996) 7

Rutan v. Republican Party of Illinois,
497 U.S. 62 (1990) 5,6,7,11

Stern v. United States Gypsum, Inc.,
547 F. 2d 1329 (7th Cir.),
cert denied, 434 U.S. 975 (1977) 9,10

United Public Workers of America v.
Mitchell, 330 U.S. 75 (1947) 8

Vega v. Kodak Caribbean, Ltd.,
3 F. 3d 476 (1st Cir. 1993) 11

Wallace v. Benware, 67 F. 3d 655
(7th Cir. 1997) 10,11

Williams v. Rhodes,
393 U.S. 23 (1968) 9

Constitution

U.S. Const. Amend. I passim

Statutes and Court Rules

28 U.S.C. §1254(1) 2

42 U.S.C. §1983 4

Supreme Court Rule 10 5

Supreme Court Rule 15 2

No. 97-754

In The
Supreme Court of the United States
October Term, 1997.

Robert Wagner and Margaret Wagner,
Petitioners,
v.
Patricia Devine, Kevin A. Jordain, Charles E. Moran, III, Arthur Therrien, John E. Whelihan, the City of Holyoke, Massachusetts, the International Brotherhood of Police Officers, and Local 388 of the International Brotherhood of Police Officers,
Respondents.

On Petition For Writ Of Certiorari To
The United States Court Of Appeals For
The First Circuit

Brief of Arthur Therrien, the International Brotherhood Of Police Officers, and Local 388 Of the International Brotherhood Of Police Officers In Opposition

---

Pursuant to Supreme Court Rule 15, the Respondents Arthur Therrien, the International Brotherhood of Police Officers, and Local 388 of the International Brotherhood of Police Officers (collectively, "Therrien") submit this brief in opposition to the petition for writ of certiorari ("Pet.").

Decisions Below

The opinion of the United States Court of Appeals for the First Circuit, reproduced at pages 1 through 11 of Appendix A to the petition ("Pet. App. A"), is reported at 122 F. 3d 53 (1997). The earlier decision of the United States District Court for the District of Massachusetts is unreported, and it is included in Appendix B to the Petition at pages 1 through 7.

Jurisdiction

The opinion of the First Circuit Court of Appeals was entered August 1, 1997. See Pet. App. A-1. The petition was filed October 30, 1997, and was received by Therrien on November 3, 1997. The petitioners invoke the Court's jurisdiction pursuant to 28 U.S.C. §1254(1).

Relevant Constitutional and Statutory Provisions

The recitation of pertinent constitutional and statutory provisions set forth at pages 2-3 of the petition is accurate, and Therrien accepts it with one addition. The United States Constitution, amendment I, provides more fully in pertinent part that "Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people . . . to petition the Government for a redress of grievances."

Statement of the Case

This action was brought by the petitioners, Robert Wagner, former Chief of Police for the City of Holyoke, and his wife Margaret Wagner, in the United States District Court for the District of Massachusetts, Western Division, on December 8, 1995, seeking recovery for alleged wrongful acts relating to his resignation from employment.

The respondents-defendants are the City of Holyoke and four city councilors. Arthur Therrien, a City of Holyoke police officer and president of the International Brotherhood of Police Officers (IBPO), Local 388; IBPO, Local 388, and the IBPO were also named as defendants.

On July 8, 1991, petitioner was appointed to the position of Chief of Police of the City of Holyoke by the Mayor. Pet. App. B-2-3. When petitioner was appointed, respondents Patricia Devine, Kevin Jourdain, Charles Moran, and John Whelihan were elected members of the Holyoke city council, and political adversaries of the Mayor. Pet. App. B-3. These four members comprised a minority of the city council. Pet. App. A-4. The Mayor had the authority to appoint or discharge the Chief of Police, but the city council likewise possessed the authority to terminate him, although in a different fashion, by controlling the salary and benefits for the position. Pet. App. A-4, 10.

The four city councilors allegedly harassed and attempted to interfere with petitioner's job performance. Pet. App. A-3-4. Petitioner claims that the city councilors criticized the manner in which he operated the police department, tried to eliminate his salary, reduced his benefits, and refused to fund programs he advocated. Id. He maintains that their actions were motivated solely by their opposition to his political beliefs and his political support of the Mayor. Id. Arthur Therrien, and through him the respondent unions, purportedly acted together with the other respondents to force the petitioner to resign by petitioning the city council about petitioner's operation of the police department and other public

concerns. Id.; Pet. App. B-4. As a result of the actions of all the respondents, petitioner eventually resigned his position as Chief of Police.

The respondents moved to dismiss this action, and after a hearing on September 20, 1996, the district court dismissed petitioner's complaint, because he would not be able to sustain his federal claim under 42 U.S.C. §1983. Pet. App. B-3. The court reasoned that the respondents' statements were an outcome of our two-party political system, and that in his position as Chief of Police, the petitioner is expected to develop a "'suitably thick skin'" to withstand the heated rough and tumble of our political life. Pet. App. B-5. The court concluded that the alleged harassment of petitioner by a minority of the city councilors and a subordinate police officer did not amount to "'a constitutionally significant burden on [Wagner's] political association right.'" Id. The court further concluded that petitioner like other high ranking municipal policymakers "was not protected by the First Amendment from partisan attacks on his job performance." Pet. App. B-6-7.

Petitioner then filed an appeal. On August 1, 1997, the First Circuit Court of Appeals affirmed the judgment of the district court. Pet. App. A-11. The First Circuit concluded that the First Amendment protection against patronage practices and its exceptions for certain higher echelon employees applied "whenever public employees are at odds politically with their superiors and thus subject to politically discriminatory behaviors." Pet. App. A-8. The court recognized the First Amendment interests on all sides and noted that a balance between these competing interests had been struck by the Supreme Court by excluding policymakers[1] from constitutional protection. The court held that since petitioner was a policymaker he had no First Amendment right to be free from discriminatory treatment based on his political association. Pet. App. A-11.

---

[1] The First Circuit used the term "policymaker" as a convenient short-hand reference for the various categories of employees for whom political affiliation is an appropriate job criterion. Pet. App. A-7 n. 7. The term is used throughout this brief in the same way.

Reasons For Denying The Writ

"A review on writ of certiorari is not a matter of right but of judicial discretion." Rules of the United States Supreme Court, Rule 10. Such a writ is to be granted "only for compelling reasons." Id. The purpose of certiorari jurisdiction is to permit the Court to select cases of "such gravity and general importance" as to warrant plenary review. In re Woods, 143 U.S. 202, 206 (1892). For the reasons set forth below, the petition does not satisfy the traditional criteria which guide the Court's discretionary review, and it should be denied.

I. THE FIRST CIRCUIT'S HOLDING THAT THE FIRST AMENDMENT DOES NOT PREVENT THE CONSTRUCTIVE DISCHARGE OF A POLICYMAKER BECAUSE OF HIS POLITICAL AFFILIATION DOES NOT WARRANT REVIEW.

Petitioner claims the Supreme Court's patronage trinity: Elrod v. Burns, 427 U.S. 347 (1976); Branti v. Finkel, 445 U.S. 507 (1980); and Rutan v. Republican Party of Illinois, 497 U.S. 62 (1990), is confined to patronage practices by an employer, not to adverse treatment by the employer's political adversaries (Pet. 9-10), and to patronage-related employment actions, not to politically-motivated employment actions. Pet. 12-15. Accordingly, petitioner alleges he is entitled to First Amendment protection, even though he acknowledges he is a policymaker (Pet. App. A-7), because he was singled out for harassment and ultimately constructively discharged by the Mayor's political opponents because of his political association with the Mayor, his employer, and his discharge was not a patronage-related employment action. Pet. 7-15. However, the decision below was a plainly correct application of settled law, and no conflict among the circuits exists.

As a general proposition, the dismissal of a public employee for purpose of political patronage violates the employee's First Amendment rights. Elrod v. Burns, 427 U.S. 347, 360 (1976). However, protection of First Amendment rights is not absolute. Id. The Court recognized that the need for government efficiency and

effective implementation of voter-sanctioned policies was a vital government interest, and therefore the First Amendment would not be offended as long as patronage dismissals were restricted to policymaking decisions. Id. at 372.

The Court reaffirmed Elrod but refined the test for determining when political affiliation would be an appropriate requirement for employment purposes in Branti v. Finkel, 445 U.S. 507 (1980). The proper test is not whether the label "policymaker" or "confidential" is attached to a particular position; instead a court should examine whether or not the hiring authority can demonstrate that party affiliation is an appropriate requirement for effective performance of the public office involved. Id. at 518.

In Rutan v. Republican Party of Illinois, 497 U.S. 62 (1990), the Supreme Court held that party affiliation was not a permissible motivating factor in patronage practices less than discharge involving lower echelon employees. However, the Court affirmed the Elrod-Branti exception for certain high level employees. Id. at 74.

In this matter, the First Circuit recognized that the Elrod-Branti principles are applicable outside the context of a new administration's patronage practices. Pet. App. A-8. The court relied upon Rutan which involved politically-motivated employment actions in the context of the implementation of a hiring freeze for state agencies, although exceptions were made allegedly on the basis of political affiliation. Further, the court noted that Rutan described Elrod and Branti as protecting public employees from dismissal " 'solely for not being supporters of the political party in power, unless party affiliation is an appropriate requirement for the position involved,' 497 U.S. at 64." Pet App. A-8. The court rightly concluded based on Rutan that First Amendment protection against adverse employment treatment for lower echelon employees and the Elrod-Branti exception for certain high-level positions apply "whenever public employees are at odds politically with their superiors and thus subject to politically discriminating behaviors." Pet. App. A-8.

The First Circuit's conclusion that the Elrod-Branti principles apply to politically-motivated actions is reinforced by other lower court decisions. In Romero-Barcelo v. Hernandez-Agosto, 75 F.3d 23 (1st Cir. 1996), for example, the court applied the Elrod-Branti principles not only to politically-motivated actions but to actions by a policymaker's political adversaries as well. There, a former governor claimed that his right to associate with his out-of-power political party was violated by alleged defamatory statements made by his political adversaries during legislative hearings into possible murder. More specifically, the former governor claimed, like petitioner here, that he was singled out for harassment and deprivation of his rights because of his beliefs and political association. The court identified the former governor as a policymaker in his party and held he had no First Amendment protection from the actions of "other politicians seeking to undermine his credibility within his own party and with the electorate." 75 F.3d at 34.

Kaluczky v. City of White Plains, 57 F. 3d 202 (2d Cir. 1995), is to the same effect. The Second Circuit held that a policymaker, even one with a statutory six-year term in office, enjoyed no constitutional protection from adverse treatment by political adversaries. 57 F. 3d at 204-205. Similarly, in Affrunti v. Zwirn, 892 F. Supp. 451 (E.D. N.Y. 1995) aff'd, 100 F. 3d 943 (2d Cir. 1986), current and former members of the town board of zoning appeals alleged that the Town Board and Town Supervisor conspired to reduce their salaries and benefits so drastically because of their political affiliation that their resignations would constitute constructive discharge. The court explained that plaintiffs were policymakers and, therefore, were not protected by the First Amendment against adverse treatment because of their political affiliation. 892 F. Supp. at 459. The First Amendment did not prevent the defendants from reducing the plaintiffs' salaries, even to the point of constructive discharge. Id.

In short, the First Circuit correctly concluded on the basis of well settled law that as a policymaker, the petitioner could be discharged or constructively discharged on the basis of his political association with the Mayor by the city council. Pet. App. A-10.

"The First Amendment is not a tenure provision, protecting public employees from actual or constructive discharge." 497 U.S. at 75.

The First Circuit's conclusion is reinforced by its recognition of the First Amendment rights of the respondents which the petitioner continues to ignore. Pet. App. A-9-11. To accept petitioner's claim that, even though he is a policymaker, he is insulated from partisan actions by elected members of the city council would deny them their First Amendment freedom of expression and associational rights.

A major purpose of the First Amendment is the protection of freedom of expression upon public questions. New York Times Co. v. Sullivan, 376 U.S. 254, 269 (1964). This expression includes discussions of public officials, government policies, structures and forms of government, the manner in which government is operated, public issues, and other matters relating to the political process. Public debate on these issues "should be uninhibited, robust, and wide-open, and . . . it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." Id. at 270. Public officials are expected "to develop a suitably thick skin to withstand the rigors of our societal, often highly politicized life." Agosto-De-Feliciano v. Aponte-Rogue, 889 F.2d 1209, 1217 (1st Cir. 1989).

To accept petitioner's claim that even though he is a policymaker, he is insulated by the First Amendment from partisan actions by the elected members of the city council would deny them their First Amendment freedom of expression and associational rights. Petitioner seeks to muzzle the elected members of the city council by suppressing their right to criticize public appointees and to advocate for or against change by elevating his First Amendment rights over theirs. "Modern American politics involves organized political parties." United Public Workers of America v. Mitchell, 330 U.S. 75, 100 (1947). Elected officials of one party are not required to sit silently while an appointed official of another party promulgates government policies, operates his office in a manner, or expounds on public issues to which they are opposed. Such a constitutional requirement would undercut representative

government and would defeat the fundamental understanding that "[c]ompetition in ideas and governmental policies is at the core of our electoral process . . . ." Williams v. Rhodes, 393 U.S. 23, 32 (1968).

Second, the right to associate with others of one's choice for the common advancement of political beliefs is an integral part of the First Amendment. Elrod v. Burns, 427 U.S. at 257. Restrictions on elected officials' ability to do their job violates their right to associate with the constituents and the constituents' rights to be represented. Peeper v. Callaway County Ambulance District, 122 F. 3d 619, 623 (8th Cir. 1997). Elected officials are charged with carrying forth the mandate of the electorate, and in order to effectuate the policies promised the voters, they must be free to discuss public affairs and implement policy. See Gonzalez v. Benavides, 712 F. 2d 142, 148 (5th Cir. 1983). They are obligated to take positions on controversial political issues so that their constituents can be fully informed by them, be better able to assess their qualifications for office, and be represented in public debate by the person they have elected to represent them. Miller v. Town of Hull, 878 F.2d 523, 532 (1st Cir.) cert. denied, 493 U.S. 976 (1989). Petitioner's limitation on the city council members would deny them the authority to do their job and deprive voters an opportunity to be heard in public debate.

The city council and the Mayor here check and balance one another. If both branches were composed entirely of members of the same political party, harmony would reign. During times like now in which the city council contains some members of the opposing party, conflict is inevitable. As the First Circuit realized, the appropriate method of settlement is through the give and take of the two branches. Pet. App. A-10. Cf. Baker v. Carr, 369 U.S. 186, 217 (1962).

Moreover, individual citizens and private organizations, like the respondents here, should not be punished for their expressions on public affairs, government officials, and matters of public interest. Their right to petition the government in an attempt to influence it or its officials is entitled to the same constitutional protection as

petitioner's claimed First Amendment right. Stern v. United States Gypsum, Inc., 547 F. 2d 1329, 1342 (7th Cir.), cert. denied, 434 U.S. 975 (1977). Criticism of governmental policy and of government officials is at the very heart of First Amendment guarantees. Id. at 1342. The respondents' actions constitute direct involvement in governance, and allowance of this lawsuit would have a dangerous chilling effect on a citizen's willingness to express his views to government officials or to lobby them to take action. Gibson v. City of Alexandria, 855 F. Supp. 133, 136 (E.D. Va. 1994).

In sum, the decision below rests on long established principles of First Amendment law. The application of these principles to this case presents no questions warranting review by this Court.

II. REVIEW IS NOT WARRANTED BECAUSE NO CONFLICT EXISTS AMONG THE LOWER COURTS.

Petitioner claims the existence of a conflict between the First Circuit and Seventh Circuit, and possibly the Second Circuit. Pet. 15-18. However, a conflict in the lower courts will not justify review unless it is "real and embarrassing." Rice v. Sioux City Cemetery, 349 U.S. 70, 79 (1955) (quoting Layne F. Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387, 393 (1923)). The purported conflicts are neither real nor embarrassing.

Petitioner first claims that the decision below is contrary to Wallace v. Benware, 67 F. 3d 655 (7th Cir. 1997). In that case a sheriff's deputy brought an action against the county sheriff, claiming that the sheriff violated his First Amendment rights by retaliating against him through harassment after the deputy announced that he would run against the sheriff in an upcoming election. 67 F. 3d at 656. The court held that a campaign of retaliatory harassment violated the deputy 's First Amendment rights even though outright dismissal would not have. Id. at 662.

The Seventh Circuit and the First Circuit, however, are not in conflict. First, the deputy sheriff in Wallace claimed the harassment

was prompted solely by political speech during his campaign, 67 F. 3d at 656-657, unlike the petitioner whose claim is based solely on his political association with the Mayor. Pet. App. A-3 n.3. Wallace did not involve politically-motivated actions directed at the deputy because of his political association with the sheriff by the sheriff's elected political adversaries. Consequently, the competing First Amendment rights that exist in this case do not exist in Wallace.

Second, unlike the deputy in Wallace, the petitioner asserts he was discharged, although constructively. Nevertheless, form is discarded for substance, and a constructive discharge is treated as tantamount to an outright dismissal. See Vega v. Kodak Caribbean, Ltd., 3 F.3d 476, 480 (1st Cir. 1993). Since an outright dismissal would not have violated the deputy's First Amendment rights in Wallace, petitioner's dismissal here does not violate his rights.

Third, in Agosto-De-Feliciano v. Aponte-Rogue, 889 F.2d 1209 (1989), the First Circuit already recognized that public employer action short of dismissal, such as subjecting an employee to less advantageous conditions and responsibilities in the nature of harassment, adversely affecting a nonpolicymaking employee, based solely on the employee's political affiliation, violates the First Amendment right of free association. Petitioner's reliance on Wallace, therefore, to show a conflict among the lower courts is meritless.

No conflict exists between the First Circuit and Second Circuit either. Petitioner refers to Liebermann v. Reisman, 857 F.2d 896 (2d Cir. 1988), which held that unfavorable public employer action short of dismissal based on an employee's political affiliation could support a federal civil rights action. This is a pre-Rutan case, and the First Circuit likewise recognized such an action for nonpolicymaking employees pre-Rutan. Agosto-De-Feliciano v. Aponte, 889 F.2d 1209 (1989).

A post-Rutan Second Circuit decision closer to this case is Kaluczky v. City of White Plains, 57 F.3d 202 (2d Cir. 1995). In that case the plaintiff was a Republican personnel officer who was reappointed to a six-year term in office in 1992, the last year of a

Republican administration. 57 F.3d at 204. After a Democrat administration took office in January 1994, they allegedly retaliated against plaintiff because of his political views, his party affiliation, and certain testimony he gave at a disciplinary hearing that ended in the dismissal of a Democrat. Id. Specifically, plaintiff alleged that the defendants humiliated, harassed, and isolated him politically, as well as drastically curtailed his professional responsibilities, in an effort to induce his resignation. Id. at 205. Plaintiff, however, did not resign. The court held that, because plaintiff was in a confidential policymaking position, he had no First Amendment protection from being fired or having his authority reduced as a result of his political beliefs and party affiliation. Id. at 207-209.

Like the petitioner here who suggests that his political association with the Mayor should insulate him from partisan politics, criticism, and public rebuke, the plaintiff in Kaluczky believed his six year tenure should insulate him from such behavior. The Second Circuit, though, rejected this notion in language equally applicable here:

> Kaluczky cannot expect to be the only policymaker in America insulated from criticism, hostility, political retribution and humiliation. Kaluczky's tenure makes some difference: it gives him a platform from which to respond to public rebuke, to challenge the administration's policies and practices, and contest any infringements on his traditional powers and responsibilities either directly to the public, in the press or (possibly) in state court . . . . In any event, the federal Constitution does not set terms of engagement for warring factions of municipal government.

Id. at 209.

In sum, no real or embarrassing conflicts between the First Circuit and the cited circuits exist to warrant review of the decision below.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

Arthur Therrien,
International Brotherhood of
Police Officers, and Local 388
of the International Brotherhood
of Police Officers,

By their attorney,

Lawrence D. Humphrey
159 Burgin Parkway
Quincy, Massachusetts 01269
(617) 376-0220

Dated: December 2, 1997

Certificate of Service

I hereby certify that three copies of the foregoing document was served upon all parties this day by first class mail, postage prepaid, to Stewart T. Graham, Jr., Esq., 39 Burleigh Road, Hampden, MA 02136; and to John H. Fitz-Gibbon, Esq. and Harry Miles, Esq., 77 Pleasant Street, P.O. Box 210, Northampton, MA 01061.

Lawrence D. Humphrey

Lawrence D. Humphrey

Dated: December 2, 1997